(1) Supreme Court, U.S.
FILED

No. ~~94-2131~~ JUN 28 1995

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK R. MARO, ESQUIRE
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Attorney for Petitioner

38 pp

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in this criminal drug conspiracy case by not considering the issues raised by the **Sixth Amendment** right to independent counsel and an implied right to effective assistance of same, void of any conflict of interest, in accordance with this Court's decision in **United States v. Ash, 413 U.S. 300, 309; 37 L.Ed.2d 619 (1973)**, when the conflict manifests itself on the record.

II.

Whether the Court of Appeals erred in this criminal drug conspiracy case by not considering the prejudice under the standard established in **Rule 801(d)(2)(E)** of the **Federal Rules of Evidence** by allowing the admission of almost four pounds of crack cocaine predicated upon the hearsay statement of a person not charged in that conspiracy and the statements were not in furtherance of that conspiracy, when the gravament of the case was predicated upon "a dry" conspiracy.

III.

Whether the Court of Appeals erred in this criminal drug conspiracy case by not applying its own recognized standard: **United States v. Beasley, 2 F.3rd 1551 (11th Cir. 1993)** requiring specific findings as to

the quantity of cocaine attributable to each of the Defendant's which would thus produce the base of the offense level upon which a sentence would be predicated and failure to do so would allow for a review de novo.

PARTIES TO THE PROCEEDING

The Petitioners in this criminal case are the Appellants/Defendants in this subject action. The Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., infra, 1a) is not reported.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on April 4, 1995. The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The right to the assistance of counsel embodied in the Sixth Amendment:

> in "all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense"

STATEMENT OF THE CASE

1. On or about the 24th day of March, 1993, an indictment was returned by the grand jury charging the Appellants with one Count of conspiracy to traffic cocaine base. A warrant was subsequently issued; Appellant Smith was arrested on the 28th day of April, 1993, and Appellant Richardson was arrested on the 6th day of June, 1993.

2. At the respective initial appearances of Appellants, no bond was set and attorney David S. Glicken filed a Notice

of Appearance on behalf of Smith and attorney Timothy R. Hartung, filed a subsequent Notice of Appearance on behalf of Richardson.

3. Smith was initially arraigned on the 3rd day of May, 1993 and plead not guilty to the indictment. After the arrest of Richardson, a superseding indictment was returned on May 26th, 1993. The Appellants were arraigned on the superseding indictment on June 4th, 1993 and did enter pleas of not guilty.

4. Richardson, through counsel, waived the 30 day rule regarding preparation for trial and also acquiesced to be tried with Smith.

5. The Appellants filed numerous and excessive motions relating to discovery and to which the Government filed appropriate responses and supporting memorandum. (The various motions, responses and rulings of the Court relating to said matters are not reiterated, herein, due to the fact that even though they are part of the record they are not germane to the issues bringing forth in the Petition.)

6. The Appellants remained incarcerated without bond and the matter was subsequently brought forth to Trial on the 22nd day of July.

7. The Government proceeded on its theory of a dry conspiracy but introduced at the time of trial, over objection of defense counsel, almost four pounds of crack cocaine, a portion of which it attributed to

Smith. That the introduction of the cocaine into the trial was predicated upon the hearsay testimony of Cheryl Ann Williams, who testified as to statements made to her by Charlie Jenkins. (App., infra, 6a). Defense counsel objected and the issue was brought forth to the Court for determination. (App., infra, 7a).

8. The trial court allowed the statements, as well as the introduction of the cocaine and same was placed before the jury. Williams was a previously indicted co-conspirator with Jenkins and various other individuals who were not party to this conspiracy, and the issue of her testimony and the subsequent introduction of the four pounds of crack cocaine into the trial was utilized as a basis of an issue on appeal.

9. During the course of the trial, various individuals gave testimony (App., infra 8a, 9a) concerning what could thus be characterized as a "guesstimate" as to the amount of alleged cocaine attributed to the Defendants.

10. The jury subsequently convicted the Defendants.

11. The trial judge utilized these "guesstimates" in the format of sentencing (App., infra 10a) of the Defendants. The issue was raised on Appeal to the Eleventh Circuit.

12. That the judgment of conviction and sentence entered by the trial court was filed and that the Appellants utilized same as a basis for their Appeal. A Notice of

Appeal was timely filed to the Eleventh Circuit (App., infra 2a).

13. While the Appeal was pending and the Clerk of the Court was preparing the Record on Appeal, Richardson filed an Affidavit documenting a conflict of interest in his retained counsel, Timothy R. Hartung (App., infra, 3a) and requested that same be included as part of the Record on Appeal (App., infra, 4a) and to which the Government took objection. The Court granted Appellants' motion (App., infra, 5a).

14. That the Court of Appeals, rendered its decision on the 4th day of April, 1995, affirming the lower court and the decision was rendered per curiam, without further explanations. (App., infra, 1a).

REASONS FOR GRANTING THE PETITION

1. First, this case presents the important issue of whether a defendant in a criminal case who raised no objection as trial, but is represented by an attorney with an actual conflict of interest appearing on the record and whose actions as a result of said conflict adversely effect his performance on behalf of his client, must prejudice be shown or may such prejudice be presumed and a new trial ordered. See **Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333 (1980).**

That Richardson's representation by his attorney was predicated upon a conflict of interest and that said conflict, itself, demonstrated a denial of the right to have an effective assistance of counsel and comply with the standard established in **Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680 (1942).**

In a criminal proceeding, the attorney for the defendant stands as the singular rampart between the full force and effect of a government's efforts to prosecute and convict, and the constitutional rights of an accused to due process of law, equal protection, and a fair and just trial. See, **Brown v. United States, 441 U.S. 223 at 231 (1973).**

When it becomes evident that an attorney has failed to protect his client's rights and act in the best interest of his client, the issue of effective assistance of counsel must be addressed, but before same can be addressed, an underlying evaluation

of "why" the defendant did not receive full protection from his attorney in his defense must be evaluated.

The very special value of the right to the assistance of counsel, embodied in the **Sixth Amendment**, and as reflected in **Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)**, is furthered by **McMann v. Richardson, 397 U.S. 759, 771 n. 14, 25 L. Ed. 2d 763 (1970)**, in that the right to counsel is deemed to be the right to effective assistance of counsel. The **Sixth Amendment** requires not merely the provision of counsel for the accused, but a real "assistance" to be "for his defense". the functional purpose of the amendment is to assure assistance in every step of the proceeding when the accused is confronted with both the intricacies of the law and the advocacy of prosecution. (emphasis supplied) **United States v. Ash, 413 U.S. 300, 309, 37 L. Ed. 2d 619 (1973)**.

It is well established that when an attorney has an actual conflict of interest i.e. such as accepting a fee from a third party in a criminal case whose interests are adverse to those of his client, a new trial must be ordered. See, **Cuyler**. Moreover, when the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it cam be shown, that his actions adversely affected the client. Likewise, a failure to act on behalf of a client before trial bears representational significance. See, **United States v. Tatum, 943 F.2d 370 (4th Cir. 1991)**. Thus, this Court in **Holloway v. Arkansas, 435 U.S. 475,**

55 L. Ed. 2d 426 (1978) cited examples of failures occurring before trial, that if attributed to a conflict situation, would constitute lapses in the defense.

In the instant case it may well have precluded defense counsel from exploring possible plea negotiations; acknowledging the need of a separate trial indicated by the Government and insulating his client from "flow over" testimony directed towards his co-defendant, Smith.

The record, herein, is of course silent on the issue of plea negotiations relative to Richardson. The Ninth Circuit has like wise spoken to issue by holding that "exploring possible plea negotiations is an important pat of providing adequate representation of criminal client, and this part is easily precluded by a conflict of interest. See, **Mannhart v. Reed, 847 F.2d 576, 582 (9th Cir.) cert. den. 488 U.S. 908, 102 L. Ed. 2d 249 (1988).**

This Court established that unconstitutional conflicting representation is never harmless error and that once the court had recognized an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrates a denial of the right to have the effective assistance of counsel. See, **Glasser**. Thus a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See, **Holloway Id. 475.**

2. By admitting into evidence almost four pounds of crack cocaine predicated upon the hearsay statement of Cheryl Ann Williams, the Eleventh Circuit created a conflict with its Ninth Circuit sister court. The court in **United States v. Fielding, 630 F.2d 1357, 1365 (9th Cir. 1980)**, reviewed various categories of statements that may be regarded as "furtherance" of a conspiracy. The court discusses various statements not to be found in the furtherance of a conspiracy, which include the following: casual admission of culpability to a third party; idle conversations between co-conspirators; mere narrative declarations of past events.

Certainly, the actions of Smith in the alleged delivery of cocaine to Jenkins and the subsequent reiteration of the circumstances concerning the gambling history of Smith and Jenkins (App., infra, 6A) falls into one or more of the categories previously eluded to in the **Fielding** decision. This goes to support the contention of Appellant Smith that the statements should be clearly excluded as statements not in the furtherance of conspiracy. The Eleventh Circuit may have also contradicted its 1986 ruling, **United States v. Anderson, 782 F.2d 908, 913** when it required the government to establish that both the maker of the statement and the party against whom the statement is offered are members of the conspiracy ("joint enterprise" or "combination") or concert of action. It is a further contention that the upholding of the trial court's admittance of the statement and the subsequent evidence, thereon, was a direct

violation of **Rule 104** and **801(d)(2)(E)** of the **Federal Rules of Evidence.**

3. The Court of Appeals erred by sustaining the conviction and sentence of the Appellants predicated upon the testimony of convicted felons relating to "guesstimates" in accordance with the standards established by this Court in **Jackson v. Virginia, 443 U.S. 307; 99 S.Ct. 2781 (1979).** (App., infra, 8a, 9a).

It is the responsibility of the government to establish the quantity of drugs involved by the preponderance of the evidence. **United States v. Ismond, 993 F.2d 1498 (11th Cir. 1993).** (Excerpt from App., infra 10a) Court colloquy at sentencing proceedings.

> "There is also a provision in the guidelines or the application notes with particular reference to the quantity of or weight of contraband that in some instances the Court must simply estimate the quantity involved for purposes of the determination of the base offense level."

There was no specific finding as to the amount or quantity of or weight of contraband specifically attributed to Smith either in amount or designated source.

CONCLUSION

This Petition for a Writ of Certiorari should be granted for the purposes of clarifying the law as it pertains to actual conflicts of attorney/client interest that appear on the record, as well as providing closure concerning hearsay statements, and establishing a grounds for reliability as to attribution of the quantity of drugs relating to sentencing of criminal defendants.

DATED the 29th day of June, 1995.

Respectfully submitted,

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Post Office Box 3868
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(904) 620-0797

Attorney for Petitioners

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JACK R. MARO, ESQUIRE
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Attorney for Petitioner

APPENDIX 1a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3228
Non-Argument Calendar

D.C. Docket No. 93-7-CR-OC-10

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JOHNNIE ANTONION SMITH
RODERICK LENAR RICHARDSON
a/k/a Rod Richardson,
Defendants - Appellants.

Appeals from the United States District Court of the Middle District of Florida

---

(April 4, 1995)

Before ANDERSON and CARNES, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

We find the issues raised in these cases to be without merit and the judgments

are due to be affirmed without oral argument or further discussion. See 11th Circuit Rule 36-1. As to the claims of ineffectiveness of counsel, we state again that such may not be raised on direct appeal when the claim has not been heard by the district court nor a factual record developed. **United States v. Khoury, 901 F.2d 948, 969 (11th Cir. 1990).** Thus, we dismiss that claim without prejudice to a proper presentation under 28 U.S.C. Section 2255.

Affirmed.

APPENDIX 2a

NOTICE OF APPEAL TO A
COURT OF APPEALS FROM A JUDGMENT
OR ORDER OF A DISTRICT COURT

United States District Court for the
Middle District of Florida
File Number 93-7(S1) CR-OC-10

UNITED STATES OF AMERICA,
Plaintiff

vs.

JOHNNIE ANTONION SMITH and
RODERICK LENAR RICHARDSON,
Defendant.

_____/

NOTICE OF APPEAL

Notice is hereby given that JOHNNIE ANTONION SMITH and RODERICK RICHARDSON, Defendants, above named, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from that certain Judgment in a Criminal Case entered on the 1st day of October, 1993, wherein, the Defendants were found guilty by a jury on the charge of conspiracy to traffic in cocaine and subsequently sentenced, thereon, to life imprisonment and 27 years, respectively.

DATED this 7th day of October, 1993.

JACK R. MARO, ESQUIRE
Attorney for Appellants
Florida Bar #174775
P.O. Box 3868
Ocala, FL 34478
(904) 620-0797

/s/_____
JACK R. MARO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF APPEAL was forwarded by United States Mail this 7th day of October, 1993, to the following: on behalf of the United States, Janice Innis-Thompson, Esquire, Assistant U.S. Attorney at P.O. Box 600, Jacksonville, FL 32201; David S. Glicken, 112-114 E. Concord St., Orlando, FL 32801; Trial Counsel for Johnnie Smith and Timothy R. Hartung, Esquire, 1112 E. Concord St., Orlando, FL 32802, Trial Counsel for Roderick Richardson.

JACK R. MARO, ESQUIRE
Attorney for Appellants
Florida Bar #174775
P.O. Box 3868
Ocala, FL 34478
(904) 620-0797

/s/_____
JACK R. MARO, ESQUIRE

APPENDIX 3a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Atlanta Georgia

UNITED STATES OF AMERICA

vs.

RODERICK L. RICHARDSON

AFFIDAVIT OF RODERICK L. RICHARDSON

State of South Carolina
City of Estill
to wit:

Roderick L. Richardson, being duly sworn, deposes and says:

1) That I am one of the defendants in the above-entitled action and I make this affidavit in support of my appeal from conviction in this case.

2) That on July 29, 1993, I was convicted by jury for conspiring to violate the drug laws of the United States.

3) That on October 1, 1993, I was sentenced to a term of 324 months (27 years) imprisonment.

4) That on or about April 5, 1993, I was present at a meeting with co-defendant Johnnie A. Smith and attorney David S. Glicken, at a McDonald's restaurant in Orlando, Florida. That this meeting was for

the purpose of securing Mr. Glicken's representation in a future federal case.

5) That on or about April 15, 1993, I was present at a second meeting with Glicken and Smith which took place at a Fort Pierce rest area; Fort Pierce, Florida. At this meeting, Johnnie Smith paid attorney Glicken a substantial sum of money to represent Smith and me in an upcoming federal case. Attorney Glicken took said sum of money from Mr. Smith.

6) That upon information and belief, Johnnie A. Smith was arrested at Arcadia, Florida on April 27, 1993.

7) That prior to his arrest on April 27, 1993, Johnnie Smith told me that should he be caught he intended to go to trial and make the government prove its case. He instructed me to keep my mouth shut if I was arrested too.

8) That on June 5, 1993, I was arrested on federal charges that led to the instant case.

9) That shortly following my arrest - a date uncertain - but before June 15, 1993, I talked with Attorney Glicken who advised that I should not be worried; that he (Glicken) had retained attorney Hartung to represent me; that the government had a weak case; and that I should not talk to the government.

10) That sometime between June 5 and June 15, 1993, I talked to attorney Hartung who also told me not to worry and advised that I was going to trial with Smith and that he thought that would be to my benefit. Hartung also told me not to talk to the government agents.

11) That at no time did I pay for attorney Hartung's services since Glicken informed me that he had taken care of Hartung's fee.

12) That I did not object to attorney Hartung's representation because I didn't know I could. Moreover, at no time did Mr. Hartung present me with a plea agreement offer from the government nor did we ever discuss a plea negotiation.

13) That upon information and belief no one connected that this case has questioned Smith as to the source of his funds.

Dated: June 1994

/s/_____
Roderick Richardson -
Affiant
13977-018 F.C.I.
P.O. Box 599 (4A)
Estill, S.C. 29918

APPENDIX 4a

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICAN
CASE NO. 93-7(S1)Cr-Oc-1

vs.

RODERICK L. RICHARDSON

_____/

MOTION TO SUPPLEMENT RECORD ON APPEAL

COMES NOW Johnnie Antonion Smith and Roderick Richardson, by and through their undersigned attorney, and files their Motion To Supplement Record on Appeal and would show unto this Honorable Court the basis for same, to-wit:

1. That the Clerk of the Court certified the record on appeal in or about the 10th day of May, 1994.

2. That in preparation of the Appellate Brief, the issue of attorney-client conflict of interest has been raised.

3. That it is necessary to supplement the record on appeal with an affidavit of Appellate, Richardson, in order to clarify patent and latent factual matters relating to the issue that do appear in the trial record.

4. That the affidavit of Richardson, which Appellants wishes incorporated as a supplement to the record on appeal, is attached hereto and marked as Exhibit A.

5. That it will not prejudice the rights of the Appellants or the Government by allowing such a supplement.

6. That Appellants initial brief is due on the 20th day of June and it is necessary to have this matter decided so as to allow counsel the opportunity to complete the initial brief in a timely fashion since the affidavit will be utilized as part of the factual and argumentative scenario, presented, therein.

WHEREFORE Appellants respectfully request granting of the Motion To Supplement the Record on Appeal and any other relief that this court deems meet and proper.

MEMORANDUM IN SUPPORT OF MOTION
TO SUPPLEMENT RECORD ON APPEAL

That the Appellant, Richardson, is alleging a conflict of attorney-client interests and as such has filed an affidavit which does not add or change factual matters appearing in the record, but confirms the existing Record on Appeal. Appellant relies on the substinative case law reflected in **Holloway v. Arkansas, 435 US 475, 55 L Ed 2d 426 (1978)** and **Glasser v. United States, 315 US 60, 86 L Ed 680 (1942)** to allow the procedural request for the supplementing of the record on appeal.

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Ocala, FL 34478
(904) 620-0797
FL Bar #174775

/s/_____
JACK R. MARO, ESQUIRE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Janice Innis-Thompson, Assistant U.S. Attorney, P.O. Box 600, Jacksonville, FL 32201 this 3rd day of June, 1994.

/s/_____
JACK R. MARO, ESQUIRE

APPENDIX 5a

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

vs. CASE NO. 93-7 Cr-Oc-10

RODERICK L. RICHARDSON
_____/

O R D E R

This cause is before the Court on the Defendant's motion (Doc. 194) to supplement record on appeal. Upon due consideration, the motion is GRANTED and the Clerk is directed to forward a copy of the affidavit specified in the motion to the Eleventh Circuit Court of Appeals.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida this 14th day of June, 1994.

/s/_____
WILLIAM TERRY HODGES
United States District Judge

Copy to counsel of record

APPENDIX 6a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Appellants,

CASE NO. 93-3228

vs.

UNITED STATES OF AMERICA,

Appellee.
_____/

(EXCERPT OF) TRIAL TRANSCRIPT (R7-174)
RELATING TO CHERYL ANN WILLIAM'S TESTIMONY

A: They were gambling one night, and Johnnie borrowed the money from Charlie. And he repayed him -- instead of giving him the money, he gave him drugs.

Q: And that's what Mr. Jenkins told you?

A: That's correct.

APPENDIX 7a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Appellants,

CASE NO. 93-3228

vs.

UNITED STATES OF AMERICA,

Appellee.
_____/

(EXCERPT OF) TRIAL TRANSCRIPT (R7-165-166)
RELATING TO SIDE BAR OBJECTION

The Court: But you didn't do that, Mr. Mueller. Your asked her what Jenkins told her, which is not a predicate question. That's the ultimate question I'm struggling with.

Mr. Mueller: Right. But I think-I mean, if you are concerned with it at the present time, I would like to go back.

The Court: There are two aspects of it that seem to me to warrant sustaining the objection. the first is that I'm somewhat troubled with respect to the state of the Record upon which the jury

could find or the court could find under **Rule 104** there is a predicate fact for the admission of the declaration under **801(d)(2)(E)** as to whether Jenkins was a member of the same alleged conspiracy with these two defendants. And, secondly even if he was, how the conspiracy was served or furthered by the declaration of Jenkins to this witness. (R7-165)

Mr. Mueller: (but the other thing is believe that there was some money owed). I haven't gotten into this yet. Johnnie Smith owed Jenkins money from a prior cocaine transaction. This so called bad cocaine was a payment for the prior Fifteen Hundred Dollars that Smith owed Jenkins. So the cocaine was given in lieu of that. So the second prong of it is simply keeping her abreast of the relationship between the two.

APPENDIX 8a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Appellants,

CASE NO. 93-3228

vs.

UNITED STATES OF AMERICA,

Appellee.

_____/

(EXCERPT OF) TRIAL TRANSCRIPT (R6-62; 67)
RELATING TO ANGILA MURRILO'S TESTIMONY

Q: How much cocaine was delivered or purchased?

A: Well, I can't really say how many. But I know every time that he would beep me, he would want one (1) kilo. But I can't say exactly how many.

Q: So all tolled, how much cocaine would you think over these fifteen or twenty times that you said that you went to Mr. Smith's house, either with your husband or with your sister or by yourself -- how much cocaine would you say that you delivered to Mr. Smith?

A: Probably twenty keys.

Q: That's twenty kilograms?

A: Yes.

APPENDIX 9a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHNNIE A. SMITH and
RODERICK LENAR RICHARDSON,

Appellants,

CASE NO. 93-3228

vs.

UNITED STATES OF AMERICA,

Appellee.
_____/

(EXCERPT OF) TRIAL TRANSCRIPT (R6-135)
RELATING TO DONNELL HICK'S TESTIMONY

A: All together?

Q: Yes.

A: About twenty keys.

Q: Can you single out how much you picked up from Mr. Smith?

A: About seven or eight.

Q: About how much did you pick up from Mr. Richardson?

A: About one or two keys.

Q: So approximately how much total?

A: About twenty-four keys.

APPENDIX 10a

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

vs CASE NO. 93-7(S1)-Cr-Oc-10

JOHNNIE ANTONIN SMITH and
RODERICK LENAR RICHARDSON,

Defendants.
_____/

EXCERPT FROM TRANSCRIPT OF SENTENCING

THE COURT: Well, the relevant guidelines, or one of them, and application notes with respect to this controversy is Section 1B1(a)(1)(B), which prescribes that the Court determine the base offense level by taking into account in the case of jointly undertaken criminal activity all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. And the application notes say that a defendant is accountable, not only for his own conduct, but the conduct of others, that was in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

There is also a provision in the guidelines or the application notes with particular reference to the quantity of or

weight of contraband that in some instances the Court must simply estimate the quantity involved for purposes of the determination of the base offense level.

And here, it seems to me, as stated by Ms. Innis-Thompson, the testimony at trial taken in its totality clearly supports, in the first instance, the verdict of the jury that these two defendants conspired and indeed work together with respect to the distribution of crack cocaine in the Ocala area as alleged in the indictment, with Mr. Richardson working in a subordinate role in relation to Mr. Smith, and perhaps is therefore somewhat less culpable, both in terms of the quantity of drugs with which he dealt directly and in relation to his culpability generally.

But I think its clear, based upon the evidence presented at trial, that the defendant Richardson was responsible in terms of not only his own conduct but reasonably foreseeable conduct of Mr. Smith in which Mr. Richardson agreed to participate in some role, either by accepting payment or the like, for at least 1.5 kilograms of cocaine base, as determined by the Probation Officer in this instance in calculating the base offense level attributable to the defendant Richardson.

And I will, therefore, overrule that objection to his presentence report as well.